BEST AVAILABLE COPY

(7)

Supreme Court, U.S.
FILED
FEB 16 2006
OFFICE OF THE CLERK

No. 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

v.

RONALD BANKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PRISON LEGAL NEWS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE FREEDOM TO READ FOUNDATION, THE ASSOCIATION OF AMERICAN PUBLISHERS, THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AND PUBLISHERS MARKETING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LUCY A. DALGLISH
GREGG P. LESLIE
SUSAN K. BURGESS
Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209

MICHAEL A. BAMBERGER
RACHEL G. BALABAN
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, NY 10020

SANFORD JAY ROSEN
Counsel of Record
JANET TUNG
Rosen, Bien & Asaro, LLP
155 Montgomery Street
Eighth Floor
San Francisco, CA 94104
Phone: (415) 433-6830

February 16, 2006

Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. PENNSYLVANIA'S PRISON POLICIES VIOLATE THE FIRST AMENDMENT 7

A. The First Amendment Right of Access to Newspapers and Magazines in Prison Is Not Inconsistent With the Legitimate Purposes of Prison Administration 10

B. The Pennsylvania Prison Regulations Disrupt the Essential Function of the Print Media and Amount to an Attempt to Restructure the Modes of First Amendment Discourse 13

C. The Pennsylvania Prison Regulations Impermissibly Discriminate Against Non-Religious, Non-Legal Newspapers and Magazines 16

II. *TURNER* DOES NOT DELEGATE THE CONSTITUTIONAL RESPONSIBILITY OF COURTS TO PRISON OFFICIALS 17

III. THE THIRD CIRCUIT CORRECTLY APPLIED *TURNER'S* REASONABLE RELATIONSHIP TEST TO PENNSYLVANIA'S COMPLETE DENIAL OF NON-RELIGIOUS, NON-LEGAL NEWSPAPERS AND MAGAZINES 20

A. Valid, Rational Connection Between the Prison Regulation and the Stated Government Interest.. 22

1. Application of the *Turner* Standard Permits Courts to Examine the Evidentiary Record 22

2. The Logical Connection Between the Regulation and the Government's Stated Goal of Behavior Modification Is, At Best, Extremely Attenuated 24

B. Availability of Alternative Means to Exercise the Constitutionally Protected Right 26

C. Effect of Accommodation 28

D. Availability of Reasonable Alternatives 29

CONCLUSION 30

APPENDIX: INDIVIDUAL STATEMENTS OF INTEREST OF THE AMICI CURIAE ..... App 1

TABLE OF AUTHORITIES

CASES

Adderly v. Florida,
385 U.S. 39 (1966) 8

Allen v. Coughlin,
64 F.3d 77 (2d Cir. 1995) 6

Amatel v. Reno,
156 F.3d 192 (D.C. Cir. 1998) 21, 22

Arkansas Educational Television Comm'n v. Forbes,
523 U.S. 666 (1998) 8, 16

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 16

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 7

Associated Press v. United States,
326 U.S. 1 (1945) 7

Banks v. Beard,
399 F.3d 134 (3d Cir. 2005) ..... passim

Beerheide v. Suthers,
286 F.3d 1179 (10th Cir. 2002) 24

Bell v. Wolfish,
441 U.S. 520 (1979) 23

Bradley v. Hall,
64 F.3d 1276 (9th Cir. 1995) 21

Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,
473 U.S. 788 (1985) 9

Crofton v. Roe,
170 F.3d 957 (9th Cir. 1999) 23, 24

Davis v. Norris,
249 F.3d 800 (8th Cir. 2001) 23

DeHart v. Horn,
227 F.3d 47 (3d Cir. 2000) 21, 22

Delker v. McCullough,
103 Fed. Appx. 694 (3d Cir. 2004) 13

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 23

Grosjean v. American Press Co., Inc.,
297 U.S. 233 (1936) 13

Houchins v. KQED,
438 U.S. 1 (1978) 3

International Society for Krishna Consciousness, Inc. v. Lee,
505 U.S. 672 (1992) ..... passim

Jacklovich v. Simmons,
392 F.3d 420 (10th Cir 2004) 21

Johnson v. California,
543 U.S. 499 (2005) 19

Johnson v. United States,
544 U.S. 295 (2005) 17

Jones v. North Carolina Prisoners' Labor Union,
433 U.S. 119 (1977) 28

Kimberlin v. U.S. Dep't of Justice,
318 F.3d 228 (D.C. Cir. 2003) 6, 29

Kleindienst v. Mandel,
408 U.S. 753 (1972) 20

Lamb's Chapel v. Center Moriches Union Free School Dist.,
508 U.S. 384 (1993) 16

Legal Services Corp. v. Velazquez,
531 U.S. 533 (2001) 14

Madrid v. Gomez,
889 F. Supp. 1146 (N.D. Cal. 1995) 15

Martin v. City of Struthers,
319 U.S. 141 (1943) 7, 8

McConnell v. Federal Election Comm'n,
540 U.S. 93 (2003) 14

McKune v. Lile,
536 U.S. 24 (2002) 25

O'Lone v. Shabazz,
482 U.S. 342 (1987) 18, 24

Overton v. Bazzetta,
539 U.S. 126 (2003) ..... passim

Pell v. Procunier,
417 U.S. 817 (1974) 3, 12, 19, 27

Perry Education Association v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 9, 10

Prison Legal News v. Cook,
238 F.3d 1145 (9th Cir. 2001) 6, 22

Procunier v. Martinez,
416 U.S. 396 (1974) 4

Rosenberger v. Rector and Visitors of the University of Virginia,
515 U.S. 819 (1995) 16, 17

Shaw v. Murphy,
532 U.S. 223 (2001) 10, 22, 23

Shoats v. Horn,
213 F.3d 140 (3d Cir. 2000) 13

Thornburgh v. Abbott,
490 U.S. 401 (1989) ..... passim

Turner Broadcasting System v. FCC,
512 U.S. 622 (1994) 13, 23

Turner v. Safley,
482 U.S. 78 (1987) ..... passim

United States v. Booker,
543 U.S. 220 (2005) 17

United States v. Kokinda,
497 U.S. 720 (1990) 9, 10, 11

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 7

MISCELLANEOUS

Dannie M. Martin & Peter Y. Sussman,
Committing Journalism – The Prison Writings of Red Hog (1995) 14

Dannie Martin, *Doing Time with Disease*,
S.F. Chronicle, June 12, 1994 14

Bob Minzesheimer, *The Written Word Unshackled*,
USA Today, April 20, 2004 15

Chase Riveland, U.S. Dep't of Justice,
Supermax Prisons: Overview and General Considerations (1999) 4

Seth Rosenfeld, *State's Top Prison Too Cruel, Judge Says*, S.F. Examiner, Jan. 11, 1995 14

Vincent Schiraldi, *Prison Bureaucrats Hide Abuses by Banning the Press*, S.F. Examiner, Feb. 5,
1996 15

William Yardley, *Inmate Can Keep Money Earned from a PEN Literary Award* N.Y. Times, April
17, 2004 15

INTEREST OF THE AMICI CURIAE[1]

Amici curiae, publishers, reporters, librarians, retailers, and other disseminators of books, newspapers and magazines, carry on the strong historic tradition recognizing the importance of an informed citizenry and thus provide communicative works, both serious and entertaining, which for more than 200 years have been protected by the First Amendment. *Amici* file this brief because the Pennsylvania Department of Corrections' blanket policy banning access for an indefinite period to virtually any and all newspapers, magazines and photographs, irrespective of content, by Level 2 inmates is an unconstitutional infringement on the rights of those prisoners. The extreme broad-brush policy impermissibly stifles the constitutionally protected free flow of information and communication in the prison context. The right to open access to the media, including sources for discussions of current national and worldwide news and events, is a fundamental right safeguarded by the First Amendment. The policy imposed by Pennsylvania violates the prisoners' ability to exercise this basic right and also unnecessarily interferes with the public interest in bringing to light possible abuse or inhumane conditions in prisons.

Access to media reports of, and discussion of issues related to, current news and events is critical. Prisoners should not be denied the right to full information concerning the United States and countries around the world, particularly against the backdrop of recent geopolitical events. Nor should prisoners be prohibited from reading short stories, reports about what is happening in sports and other areas of general interest, or lighter materials. The ability to access information by reading newspapers and

---

[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been filed with this Court.

magazines is essential to the education and advancement of all persons—including, in particular, those who presently are in prison but may return to society.

The statements of interests of the individual *amici curiae* are set forth in the Appendix.

STATEMENT OF THE CASE

This case is about the free speech rights of prisoners and their media correspondents. Pennsylvania imposes a set of prison regulations that impermissibly curtails the First Amendment rights of newspaper and magazine publishers and writers to transmit ideas and information. Unless a publication is deemed by prison officials to be religious or legal in nature, publishers have no way of sending newspapers and magazines to individuals housed in Level 2 of Pennsylvania's Long Term Segregation Unit ("LTSU"). *Banks v. Beard*, 399 F.3d 134, 137 (3d Cir. 2005). Whether a publication falls into one of these categories is left to the standardless discretion of prison officials. As the exceptions have been applied, the free speech rights of some religious publishers have been infringed, *see* Jt App 179 (Level 2 inmates not permitted to receive the *Christian Science Monitor*, a weekly newspaper published by the First Church of Christ, Scientist), as have the rights of legal news publishers, *see* Jt App 49 (Level 2 inmates not permitted to receive *Graterfriends*, a monthly publication containing news on legal and other developments affecting prisoners).

A prisoner may be kept at Level 2 indefinitely. Jt App 131 (the duration of a prisoner's classification at Level 2 is a minimum of 90 days and has in some cases lasted months and even years). Prison officials encourage inmates entering LTSU to cancel all newspaper and magazine subscriptions. Jt App 158. If the prisoner does not cancel the subscription, the publications are kept in a property box for him; after the box capacity is filled, the publications are destroyed or otherwise disposed of. Jt App 159.

SUMMARY OF ARGUMENT

This case strikes at the heart of the First Amendment's protection of the exchange of information and enlightened participation of all citizens in a democratic government. Although the direct effect of the challenged prison regulation is to block the flow of information into the prison, its impact extends beyond prison walls. It treads heavily on the rights of the print media and interferes with the media's central function as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Houchins v. KQED*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring). The media's ability to fulfill its function as the so-called Fourth Estate depends on its access to the darkest corners of the nation, "acting as the 'eyes and ears' of the public," and, at times, as its voice. *Id.* at 8 (opinion of Burger, C.J., announcing judgment of the Court).

Where the venue is under the exclusive control of the government, as with prisons, several principles deserve consideration. It is true that the Constitution's guarantees of free speech and press do not grant the media a freestanding right to enter governmental institutions. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974). Its access can, and has been, tightly circumscribed. *See, e.g., id.* (prisons may deny journalists access to face-to-face interviews with specific prisoners); *KQED*, 438 U.S. 1 (jail can prohibit use of sound and image recording devices and can restrict media tours). But the media's interest in access to prisons is not limited to direct investigative reporting. Printed publications convey information as well as provide a forum for discussion and response. An inmate who has access to newspapers and magazines might, for example, read a news article discussing matters he is personally familiar with—perhaps prison conditions—and respond to the editor by offering relevant information or a unique perspective. Only his receipt of the

news publication enables this important mechanism of exchange to occur. The media entities' and prisoners' speech rights are, in this manner, "inextricably meshed." *Procunier v. Martinez*, 416 U.S. 396, 409 (1974).

Here, the constriction on media access is too tight for the Constitution to tolerate. Pennsylvania's policies destroy the mechanism of expressive exchange between print media entities and the affected class of prisoners. Its attempt to amputate a segment of the prison population from the outside world harms the rest of society, and is precisely the type of government action that the First Amendment was designed to restrain. Under the circumstances created by the near-absolute ban on newspapers and magazines, the competing interest of allowing the government broad discretion in the administrative duties of running a prison cannot trump the weighty concerns of the press and the public in fostering the healthy exchange of ideas.

Aside from personal letters, news clippings related to the inmate or his family, and a narrowly drawn category of religious and legal materials, the only written materials available to Level 2 inmates are "leisure books" from the prison library. *Banks*, 399 F.3d at 137; Jt App 48. As a result, inmates effectively are cut off from news of current events and other developments in the outside world. *See id.* (inmates are shut in single occupancy cells for twenty-three hours a day with no radio or television and permitted only one visit per month with immediate family members). Prison policies provide for a behavioral review where, subject to the discretionary decision of prison officials, an inmate can be promoted to a less restricted status. *Banks*, 399 F.3d at 141; Jt App 26. Due to the subjective nature of the review, there is no reasonable assurance that even exemplary behavior in Level 2 status will earn a relaxation of the restrictions. *Accord* Chase Riveland, U.S. Dep't of Justice, *Supermax Prisons: Overview and General Considerations* 8-9 (1999) ("[A]dministrative segregation of

an inmate...is an approved remedy [in some institutions] without application of objective criteria or verified misconduct.... Following periodic reviews, segregation of such inmates may then be continued, despite exemplary behavior in segregation....").

Publishers, editors, and writers have little effective means of communicating with these inmates. Direct personal letters to individual prisoners are not a realistic option for print media since ideas and information expressed through printed publications lose fundamental characteristics if redirected through individual letters. Personal letters to prisoners cannot contain the same breadth of information, juxtaposition of different opinions, or graphics and photographs, or capture the common experience enjoyed by those who read the same article in a publication. Corresponding this way is practically impossible for publishers and writers given the fundamental purpose of the printed publication to facilitate widespread dissemination of information at minimal cost. Although an inmate can initiate correspondence with the editor of a particular publication by sending a personal letter, the Level 2 policies deny the inmate access to the materials most likely to cause him to correspond in the first instance—the publications themselves. In this way, the prison's ban on general publications disrupts the basic discursive function of informative or opinion pieces, which catalyze idea exchange by presenting views likely to generate responsive expression.

First Amendment rules applicable to non-public fora govern the Court's review of the Pennsylvania policy. In the prison context, these rules are set forth in a multifactor test that requires federal courts to balance cautiously the legitimate needs of prison administration and "the need to protect constitutional rights." *Turner v. Safley*, 482 U.S. 78, 85 (1987) (alteration omitted). The manifold nature of the *Turner* test recognizes the tension between these competing goals. At risk on one hand is judicial disruption of the

"inordinately difficult undertaking that is modern prison administration." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quotation marks omitted). On the other hand are the vulnerable interests of prisoners, who, though they must give up liberties "inconsistent with proper incarceration," nonetheless do not relinquish their constitutional rights at the prison gates, *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), as well as the interests of the media and the public.

The various concerns at stake require that the *Turner* test be applied with an eye towards the competing principles and the ultimate inquiry: Is the challenged restriction on constitutional rights "reasonably related to legitimate penological interests" or is it an "exaggerated response" to prison concerns? *Turner*, 482 U.S. at 89, 91. It stands to reason that the broad focus of the test should not permit its application as either judicial bludgeon or rubber stamp. As testimony to the "express flexibility of the *Turner* reasonableness standard," *Thornburgh*, 490 U.S. at 414, lower court decisions have come down both ways on a variety of different prison regulations. *Compare, e.g., Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228 (D.C. Cir. 2003) (upholding prison ban on electric and electronic musical instruments) *with Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) (striking down restriction on subscription non-profit organization mail) *and Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995) (reversing summary judgment in favor of prison officials who confiscated newspaper clippings). This case presents the opportunity to reaffirm the careful balance Justice O'Connor struck in her opinion for the Court in *Turner*. If the Court is to remain true to its promise that the *Turner* standard "is not toothless," *Thornburgh*, 490 U.S. at 414, it must affirm the decision of the Court of Appeals for the Third Circuit. Prison policies like Pennsylvania's cannot be permitted to suppress the ability of print media to facilitate "the widest possible dissemination of information from diverse and antagonistic

sources...[, a task] essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

ARGUMENT

I. PENNSYLVANIA'S PRISON POLICIES VIOLATE THE FIRST AMENDMENT

Where a state action impinges on the expressive rights of citizens, as here, analysis of its lawfulness is guided by basic First Amendment precepts. At the foundation of the Constitution's protection of the right to speech is the belief that free and vigorous exchange of opinions and information is what enables our democracy to thrive. *Accord United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000) ("It is through speech that our convictions and beliefs are influenced, expressed, and tested."). Although some ideas, in and of themselves, might not contribute to the betterment of society, it is their role in the process of experimentation, adaptation, and expression that the First Amendment protects. *See id.* ("The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." (alteration omitted)); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."). Watchful guardianship of these core principles is "essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

Thus, in general, courts must uphold the rule that "the First Amendment bars the government from dictating what we see or read or speak or hear." *Free Speech Coalition*, 535 U.S. at 245. When government action threatens the role of the print media in facilitating idea exchange, the right to speech and expression must be more jealously guarded. *See*

Martin, 319 U.S. at 143 n.3 ("The only security of all is in a free press."). Naturally, these are guiding principles, not absolute rules. As many decades of this Court's precedent and the practicalities of government instruct, the contours of the First Amendment must fit the context and nature of the state action that impairs the freedom of speech. When the government owns and controls the venue in which it seeks to regulate speech, First Amendment doctrine imposes a tripartite framework, which looks first, as a threshold matter, at the purpose of the forum. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (hereafter "*ISKCON*") (A long line of speech rights cases "reflect, either implicitly or explicitly, a 'forum based' approach for assessing restrictions that the government seeks to place on the use of its property."). The three types of fora, in descending order of the First Amendment's vigilance, are: the traditional public forum; the designated public forum; and the non-public forum, which encompasses "all remaining public property." *See id.* at 678-79.

There is no question here that a state prison is not a public forum, and its rules therefore are not subject to strict scrutiny under the First Amendment. *See, e.g., Adderly v. Florida*, 385 U.S. 39 (1966) (restriction of First Amendment activities on jailhouse curtilage subject to reasonableness review). But "nonpublic forum status does not mean that the government can restrict speech in whatever way it likes." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) (quotation marks omitted). State action imposing "a restriction on speech in a nonpublic forum is 'reasonable' when it is 'consistent with the government's legitimate interest in preserving the property for the use to which it is lawfully dedicated.'" *ISKCON*, 505 U.S. at 688 (O'Connor, J., concurring in the judgment) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1983); quotation marks, alterations, and ellipsis omitted). Government regulations may "limit[] a nonpublic forum to

activities compatible with the intended purpose of the property," but ultimately the "touchstone for evaluating these [regulations] is whether they are reasonable in light of the purpose which the forum at issue serves" and are viewpoint neutral. *Perry*, 460 U.S. at 49; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

Turner v. Safley reaffirmed these principles and set forth guidelines for their application in the prison context. *See* 482 U.S. at 89-91 (outlining four factors relevant to determining whether a prison regulation is "reasonably related to legitimate penological interests" and "operate[s] in a neutral fashion"). *Turner* and subsequent cases made clear that prison free speech cases are subject to the same "reasonableness" inquiry applied to non-public forum cases generally. The prison-specific *Turner* line of cases coevolved with the development of general forum based First Amendment doctrine. In the 1980s, as the focus on the "nature of the relevant forum" became established as the primary threshold inquiry for all government speech regulation, the prison context became determinative of the applicable standard of review. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 726 (1990) (explaining that in 1983, *Perry* "announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property," which had been in development since a decade prior).

Thornburgh v. Abbott, 490 U.S. 401 (1989), aligned prison speech cases with the rest of "forum based" doctrine. It resolved any lingering ambiguity that the identity of the holder of the right, rather than the nature of the forum, could dictate the application of a fatal, or near-fatal, strict scrutiny approach. 490 U.S. at 409-14 & n.9 ("[O]ur rejection of the regulation at issue [in *Procunier v. Martinez*, 416 U.S. 396 (1974),] resulted not from a least restrictive means requirement, but from our recognition that the regulated activity centrally at issue in that case—outgoing personal

correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security."). What these two decades of decisions teach is that, notwithstanding Petitioner's arguments to the contrary, prisons are not *sui generis* for First Amendment purposes. They are instead a type of non-public forum subject to the same basic constitutional principles and constraints as other non-public fora, such as airports, *see ISKCON*, 505 U.S. 672, and public school mail systems, *see Perry*, 460 U.S. 37.

A. The First Amendment Right of Access to Newspapers and Magazines in Prison Is Not Inconsistent With the Legitimate Purposes of Prison Administration

A broad-based restriction of speech on a non-public forum must be supported by at least "some explanation as to why [the restricted] speech is inconsistent with the intended use of the forum." *ISKCON*, 505 U.S. at 691-92 (O'Connor, J., concurring in the judgment); *cf. Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("In the First Amendment context,...some rights are simply inconsistent with the status of a prisoner or 'with the legitimate penological objectives of the corrections system.'"). Without some sort of justification, the government regulation is likely to be unreasonable in relation to the legitimate needs of the forum, or in *Turner*'s terms, an "exaggerated response" to administrative concerns. *Turner*, 482 U.S. at 90. Although the nature of the forum plays an important role in determining compatibility, some liberties that fall within the First Amendment's ambit are consistently more easily curtailed than others. Associational rights involving in-person, physical interaction tend to pose the greatest security risks and administrative costs in many different contexts. *See, e.g., Overton*, 539 U.S. 126 (prison visitation); *ISKCON*, 505 U.S. 672 (in-person solicitation inside airport); *Kokinda*, 497 U.S. 720 (solicitation and demonstration on post office premises). Regulations limiting freedom of

association are perhaps the most frequently and easily sustained. *Accord Overton*, 539 U.S. at 131 ("[F]reedom of association is among the rights least compatible with incarceration."). The problems accompanying physical association are sometimes so "obvious that its regulation may 'ring of common sense.'" *ISKCON*, 505 U.S. at 690 (O'Connor, J., concurring in the judgment) (quoting *Kokinda*, 497 U.S. at 734). Other First Amendment rights, by contrast, are more compatible with the purpose of the government property, and are more robust in the face of extensive regulation. *Cf. Kokinda*, 497 U.S. at 739 (Kennedy, J., concurring in the judgment) ("[I]n-person solicitation deserves different treatment from alternative forms of solicitation and expression.").

The opposite results reached in the *International Society for Krishna Consciousness* decisions (collectively, "*ISKCON*"), 505 U.S. 672 and 505 U.S. 830, illustrate the constitutional difference between regulating rights requiring physical interaction and regulating free speech rights exercised through printed materials. *ISKCON* concerned a challenge to restrictions limiting solicitation and distribution of leaflets in New York area airports. 505 U.S. 672; 505 U.S. 830. The solicitation ban was a legitimate response to the airport's need to avoid disrupting the flow of traffic and prevent the risk of duress, and its inability to monitor problems arising from solicitation. 505 U.S. at 683-85. By contrast, the prohibition of leafleting could not withstand First Amendment scrutiny even though it was supported by many of the same justifications. 505 U.S. at 831. Justice O'Connor, authoring the concurring opinion and stating the narrowest grounds for the holding as to the leafleting ban, explained that it could not stand because it "effect[ed] an absolute prohibition and [was] not supported by any independent justification outside of the problems caused by the accompanying solicitation." *Id.* at 691. The availability of "alternative channels" for distributing leaflets—the

sidewalks outside the airport terminals—was not enough to protect the First Amendment rights of leafletters from the "total ban" imposed inside the terminal buildings. *Id.* at 692. The appropriate focus was on the area impacted by the agency regulation—the inside of the airport—where the restriction was so sweeping in scope that it could not be explained as a reasonable measure designed to "preserve the property for the several uses to which it has been put." *Id.*

First Amendment concerns in the prison context are no different. Limitations on in-person associational rights require little work to justify because the "very object of imprisonment is confinement." *Overton*, 539 U.S. at 131; *see also Pell*, 417 U.S. 817. In-person association in the prison context also poses serious safety and security risks, which unquestionably are an area of concern primary to the government's legitimate purpose of running a prison. *See Overton*, 539 U.S. at 133-34. Just as the burden on visitation rights in *Overton* is analogous to the prohibition on airport solicitation, so is the near-"absolute ban" on published materials in this case analogous to the rule against distributing printed leaflets in the airport terminal in *ISKCON*. In several ways, the speech rights of newspaper and magazine publishers suffer even more severe oppression here than those of the leafletters in *ISKCON*. Publishers attempting to send subscription periodicals to Level 2 prisoners are prevented from engaging in a desired, indeed contracted-for, expressive exchange. In *ISKCON*, however, the speakers' activity was likely to be unwanted by most potential listeners. Even with the ban in place in *ISKCON*, a traveler so desiring could always seek out leaflet distributors outside the terminal building. But in the Pennsylvania prison system, the publisher's access to the subscriber is cut off completely and indefinitely.[2] Because nothing in this case

[2] Indefinite detention is more than merely theoretical. Pennsylvania prisoners have actually been held in segregation for over 30 years. *See*,

explains why the First Amendment right to send newspapers and magazines to prisoners is incompatible with the central purposes of running a prison, just as with the *ISKCON* leafletters, application of the *Turner* reasonableness inquiry should yield the same result.

B. The Pennsylvania Prison Regulations Disrupt the Essential Function of the Print Media and Amount to an Attempt to Restructure the Modes of First Amendment Discourse

The special role of the press as catalyst and facilitator of expressive exchange is a well-recognized and driving force of First Amendment law. *See, e.g., Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936) (The Constitution must "preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country...have shed and continued to shed[] more light on the public and business affairs of the nation than any other instrumentality of publicity...."). Its unique position "as one of the great interpreters between the government and the people," *id.*, necessitates the rule that "laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State, and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broad. System, Inc. v. Fed. Communications Comm'n*, 512 U.S. 622, 640-41 (1994) (quotation marks omitted); *Grosjean*, 297 U.S. at 250 ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

---

e.g., Delker v. McCullough, 103 Fed. Appx. 694, 2004 WL 1552608 (3d Cir. 2004) (unpublished) (inmate had been held in administrative segregation since 1973); *see also Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000) (inmate held in segregation for 8 years). The Pennsylvania prison policy thus raises the specter of a lifetime publication ban.

Any attempt by the government, whether overt or not, to "determin[e] what future course the creation of ideas and the expression of views must follow" should be treated with suspicion. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 305 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). When the government imposes a special burden on the media, as Pennsylvania has here, the constitutional concerns multiply. Not only do such regulations stifle expressive acts, they pose a special danger to the First Amendment because they jeopardize certain forms of expressive exchange. Where the government tries to "foreclose new and creative partnerships for speech," such as by preventing one segment of the prison population from engaging in productive discourse, its action "is consistent with neither the traditions nor principles of our Free Speech guarantee." *Id.*; *cf. Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (striking down restriction that had the effect of "distort[ing] the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed" by unconstitutional restrictions).

The ability of prisoners to communicate outside prison walls is essential to the media's role in exposing important public controversies. History contains countless examples of the media's involvement in bringing to light, and eventually to justice, instances of prison abuse and inhumane conditions. *See, e.g.*, Dannie M. Martin & Peter Y. Sussman, *Committing Journalism – The Prison Writings of Red Hog* (W.W. Norton & Co. 1995) (news stories about Kevin Sherbondy, sentenced to 15 years for "possession" of a firearm he owned for decorative purposes brought significant attention to the case and resulted in the Ninth Circuit overturning his sentence); Dannie Martin, *Doing Time with Disease*, S.F. Chronicle, June 12, 1994, at 4 (calling attention to feces-contaminated drinking water at Terminal Island Federal Prison); Seth Rosenfeld, *State's Top*

Prison Too Cruel, Judge Says, S.F. Examiner, Jan. 11, 1995, at A1 (public outcry after media reports of inmate being boiled alive led to class-action litigation and, ultimately, a court ruling finding conditions at Pelican Bay prison unconstitutional); Vincent Schiraldi, *Prison Bureaucrats Hide Abuses by Banning the Press*, S.F. Examiner, Feb. 5, 1996, at A13 (prison administrators imposed a ban on media interviews with prisoners partly in reaction to bad publicity generated by "60 Minutes" exposé on prisoner abuse incident); *see also Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995) ("dry words on paper can not adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices [at Pelican Bay] leave in their wake."); Bob Minzesheimer, *The Written Word Unshackled*, USA Today, April 20, 2004, at 4D (strong public reaction to cancellation of prison rehabilitation writing program and denial of royalty fees and prize money to prisoners led to reinstatement of program and prize money); William Yardley, *Inmate Can Keep Money Earned from a PEN Literary Award*, N.Y. Times, April 17, 2004, at B1 (rehabilitation program was reinstated, according to state Attorney General, because communicating with the public gives "prisoners the right and opportunity to express themselves and to rehabilitate in the best sense of the word").

The proper functioning of the media depends not only on prisoners' ability to transmit information outside the prison, but also on their ability to receive news from the outside. At times, a newspaper writer or editor may be able to confirm whether an incident was an isolated event or widespread prison condition only through disseminating information to prisoners and collecting their responses. Any government interference in this process, let alone Pennsylvania's attempt to entirely quash it with respect to the Level 2 prisoners, threatens an essential means of holding a powerful government institution accountable.

C. The Pennsylvania Prison Regulations Impermissibly Discriminate Against Non-Religious, Non-Legal Newspapers and Magazines

The First Amendment requires prison regulations to be viewpoint neutral. *Thornburgh*, 490 U.S. at 417; *see also Arkansas Educ. Television Comm'n*, 523 U.S. at 682 ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint...."). Viewpoint discrimination occurs not just when one particular point of view is suppressed, but also when "an entire class of viewpoints" is disfavored. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831 (1995). The Constitution does not tolerate regulations that burden those wishing to exercise their First Amendment rights on the grounds that their point of view is religious. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993); *see also Rosenberger*, 515 U.S. at 831 (public university could not treat disfavorably "student journalistic efforts with religious editorial viewpoints.")

But just as the state cannot disfavor publications featuring a religious "standpoint from which a variety of subjects may be discussed and considered," *Rosenberger*, 515 U.S. at 831, neither can it discriminate against the non-religious viewpoint expressed through newspapers and magazines. The Pennsylvania prison policies are not viewpoint neutral because they do exactly that. The collection of religious viewpoints discriminated against in *Rosenberger* is the flip side of the coin to the set of non-religious viewpoints prohibited here, and no principled distinction can be drawn between the restriction at issue in *Rosenberger* and the policies at issue here. *Accord Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230-31 (1987) (holding unconstitutional a tax on publications that exempted religious and sports magazines, and acknowledging that the distinction between content and

viewpoint-based discrimination is not always clear). Even more antithetical to the First Amendment is the fact that Pennsylvania's policies grant prison officials the discretion to determine whether a publication is religious. As this Court has cautioned: "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger*, 505 U.S. at 835. This warning is particularly apt here, where no safeguards exist to prevent the state from exercising its discretion to permit the materials of one religion while prohibiting the materials of another.

Also suspect is the application of the policy to legal materials. News of important legal developments and court decisions are often contained in a wide array of publications, the vast majority of which are prohibited under the Pennsylvania policy. *Cf.* Jt App 49. This Court's decisions related to criminal procedure, civil liberties, and federal habeas law, for example, are often reported by national print media. Decisions such as *United States v. Booker*, 543 U.S. 220 (2005) (criminal sentencing), *Johnson v. United States*, 544 U.S. 295 (2005) (time limitation of federal habeas statute), or the result of this case, could directly affect inmates in segregated housing. Only through access to general publications can these prisoners receive necessary information about changes in their legal rights and therefore exercise their right to access courts.

II. *TURNER* DOES NOT DELEGATE THE CONSTITUTIONAL RESPONSIBILITY OF COURTS TO PRISON OFFICIALS

In *Turner v. Safley*, this Court reaffirmed the duty of "federal courts...to protect constitutional rights" in the face of "a prison regulation or practice [that] offends a fundamental constitutional guarantee." 482 U.S. at 84 (quoting *Martinez*, 416 U.S. at 405-06 (1974)). *Turner* decisively rejected the notion that fundamental rights

enjoyed by free citizens vanish upon incarceration. *See id.* at 94-95 (rejecting prison officials' argument that the constitutional right to marriage does not apply "in...a prison forum"). Subsequent decisions likewise acknowledged courts' obligation to examine prison regulations alleged to infringe on constitutional rights. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 137 (2003) (Stevens, J., concurring) ("Our decision today is faithful to the principle that 'federal courts must take cognizance of the valid constitutional claims of prison inmates.'" (quoting *Turner*, 482 U.S. at 84)). Recognizing, however, the risk that courts engaged in constitutional review might too easily displace the reasoned judgment of prison administrators, the Court explained that the proper inquiry was whether the challenged prison regulation was "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

To strike the right balance between the competing interests of oversight and deference, *Turner* laid out four factors that help inform courts whether a challenged restriction passes constitutional muster or whether it is an "'exaggerated response' to prison concerns." *Id.* at 89-91. By requiring careful consideration of multiple factors, *Turner* declined to abdicate the duty of judicial review to prison administrators. *Cf. O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987) ("[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."). It instead sets forth a flexible framework that allocates deference where it is due—evaluation of legitimate penological interests such as "deterrence of crime, rehabilitation of prisoners, and institutional security," *id.*—but contemplates court intervention when prison restrictions work an unreasonable deprivation of constitutional rights. *See, e.g., Turner*, 482 U.S. at 95-100 (invalidating prison marriage rule). In formulation and application, it is clear that *Turner*'s reasonableness standard is neither "toothless" formalism nor

strict scrutiny, but a deferential inquiry somewhere between these poles. *Thornburgh*, 490 U.S. at 414.

Because the *Turner* inquiry integrates all relevant considerations, it applies regardless of whether the rights asserted belong to inmates or free persons. *See, e.g., id.* at 413-14. Constitutional challenges to prison restrictions that curb the liberty of free citizens whose interests are intertwined with those of inmates have come before this Court with some regularity. *E.g., Overton*, 539 U.S. 126 (restriction on prison visitation); *Thornburgh*, 490 U.S. 401 (regulation of incoming publications); *Pell*, 417 U.S. 817 (restriction on media interviews of prisoners). In its review of these cases, the Court has declined to draw a doctrinal line based on the identity of the party asserting the right. *E.g., Thornburgh*, 490 U.S. at 410 n.9. Were an intrusive standard of scrutiny to apply whenever non-prisoners' rights are implicated, prison officials would rapidly lose the ability to "deal with the difficult and delicate problems of prison management" free from excessive court interference. *Id.* at 408. Proper application of the *Turner* analysis, on the other hand, enables courts to give the outsiders' interests their due weight while maintaining appropriate judicial deference. *Cf. Overton*, 539 U.S. at 133 (considering in its reasonableness analysis the interests of children whose visitation was limited by prison rules). As *Turner* offers the unitary standard of review of restrictions "[i]n the prison context, when the government's power is at its apex," *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1150 (2005), remaining faithful to its guiding principles requires considered examination of all concerns captured by the four factors.

The lopsided formulation urged by Petitioner and its *amici* upsets this thoughtful balance. Petitioner's argument transforms *Turner* into carte blanche to subjugate the core constitutional rights of prisoners and non-prisoners alike in the name of creating sufficiently harsh conditions of confinement. Playing by these rules, prisons could freely

"exten[d] and withdraw[]" fundamental rights with no more difficulty than they could grant or deny gym privileges and commissary access. Brief for the United States as Amicus Curiae 11. The approach it advocates defines the remaining three factors as a tautological restatement of the first inquiry, reducing the analysis to an empty formality irreconcilable with *Turner* itself. Application of the *Turner* test in this manner champions form over substance, and derogates the duty of federal courts to guard against restrictions that unreasonably invade constitutional boundaries in the name of prison administration. The Court should reject this thinly cloaked invitation to erect a de facto "barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84.

III. THE THIRD CIRCUIT CORRECTLY APPLIED *TURNER'S* REASONABLE RELATIONSHIP TEST TO PENNSYLVANIA'S COMPLETE DENIAL OF NON-RELIGIOUS, NON-LEGAL NEWSPAPERS AND MAGAZINES

It is well established that the First Amendment protects the right to disseminate as well as "receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). The right survives incarceration and extends to both prisoners and "free citizens...reaching out to those on the 'inside.'" *Thornburgh*, 490 U.S. at 407. And "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Id.* at 408.

The Pennsylvania prison policy banning newspapers and magazines in Level 2 of the Long Term Segregation Unit prevents publishers and inmates from exercising their First Amendment rights to send and receive publications. Because the regulations "impinge[] on inmates' constitutional rights," the Third Circuit correctly applied the analysis set forth in *Turner* to determine the validity of the

prison policy. *Banks*, 399 F.3d at 139. Under *Turner*, a "regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Consideration of four factors is relevant to the determination. First, the court "must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Thornburgh*, 490 U.S. at 414. "A second factor...is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 89. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* at 90. Fourth, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.*

Neither this Court nor lower federal courts applying the four *Turner* factors have understood these to be four distinct litmus tests. Rather, courts consistently have taken care to consider each of the factors in relation to one another prior to making the ultimate evaluation of the fit between the prison policy and the penological goal. *E.g.*, *Jacklovich v. Simmons*, 392 F.3d 420, 427 (10th Cir. 2004) (holding in error the district court's failure to consider all but the first factor); *DeHart v. Horn*, 227 F.3d 47, 59 (3d Cir. 2000) ("*Turner* does not call for placing each factor in one of two columns and tallying a numerical result. The objective is to determine whether the regulation is reasonable given the prison administrators' penological concerns and the inmate's interest in engaging in the constitutionally protected activity."); *Amatel v. Reno*, 156 F.3d 192, 191-201 (D.C. Cir. 1998) (weighing all four factors before determining that statute satisfied reasonable relation test); *Bradley v. Hall*, 64 F.3d 1276 (9th Cir. 1995).

It is sometimes said that the first factor of the *Turner* test, whether there is a logical connection between the regulation and a legitimate penological interest, dominates the inquiry. *E.g.*, *Amatel*, 156 F.3d at 196 ("The first factor looms especially large."). As this Court has explained, the heightened importance attributed to the logical connection factor does not mean that the remaining factors should be ignored in all cases, but arises from the necessary invalidation of any regulation that does not satisfy its standard. *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor."). In other words, nothing can save a regulation that bears no "logical connection" to a legitimate goal. *See, e.g.*, *Prison Legal News*, 238 F.3d at 1149-51 (invalidating restriction on subscription non-profit organization mail, "core protected speech," after considering first factor). The inverse, however, is not true. The challenged regulation's survival of the first factor still requires reasoned consideration of the remaining factors. Thus, the purported dominance of the "logical connection" factor refers to the cases where its application is fatal to the regulation. In all remaining cases, *Turner* requires "a judgment by the court regarding the reasonableness of the defendant's conduct under all of the circumstances reflected in the record." *DeHart*, 227 F.3d at 59.

A. Valid, Rational Connection Between the Prison Regulation and the Stated Government Interest

1. Application of the *Turner* Standard Permits Courts to Examine the Evidentiary Record

The first factor presents a twofold inquiry: is "the governmental objective underlying the regulations at issue [] legitimate and neutral, and [are] the regulations [] rationally related to that objective"? *Thornburgh*, 490 U.S. at 414. Among legitimate prison interests, "protecting prison

security[is] a purpose this Court has said is 'central to all other corrections goals.'" *Thornburgh*, 490 U.S. at 415 (quoting *Pell*, 417 U.S. at 823); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Any regulation whose dominant purpose is to advance prison security would naturally be entitled to considerable deference. These concerns do not, however, command that courts give a free pass to prison officials who utter the right magic words. Courts remain charged with the task of detecting when a restrictive measure is the kind of "exaggerated response" this Court has long warned of, lest constitutional abuses simply be recast through the talismanic invocation of "security" and "order."

Despite Petitioner's contentions to the contrary, *Turner*'s rational relation factor has always entailed more than the bare minimum level of judicial review. *Cf. Turner Broad. Sys.*, 512 U.S. at 641 ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force."). Courts applying *Turner* limit their consideration to penological goals actually advanced by prison officials. *Compare Shaw*, 532 U.S. at 229 (a rational connection must exist between regulation and the "governmental interest put forward to justify it") *with FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (rational basis review of Congressional action asks only whether there exists "any reasonably conceivable state of facts that could provide a rational basis," and the inquiry stops as soon as the court is able to imagine "'plausible reasons' for Congress' action"). Under the *Turner* framework, courts may not invent or substitute their own penological goals and rationale. *Cf. Davis v. Norris*, 249 F.3d 800 (8th Cir. 2001) (remanding for lack of evidence from the government); *Crofton v. Roe*, 170 F.3d 957, 960-61 (9th Cir. 1999). Courts must base their evaluation on the evidentiary record and the application of "common sense." *Turner*, 482 U.S. 97-98.

Although the burden of proof lies with the prisoner, *Overton*, 539 U.S. at 132, nothing about the burden allocation prohibits courts from "look[ing] closely at the facts of a particular case and the specific regulations and interests of the prison system" for evidence of a rational relationship. *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002). Where the nexus between a regulation and the government goal seems weak, the government's lack of "specific facts or explanation to support its argument," *Crofton v. Roe*, 170 F.3d at 960, might well suggest an attenuated relationship or exaggerated response. *Accord O'Lone*, 482 U.S. at 359 (Brennan, J., dissenting) (observing that "prison officials are in control of the evidence"). The Third Circuit engaged in no more searching an inquiry in this case than was proper under *Turner* to test the nature of the fit between the regulation and the stated goal. *See Banks*, 399 F.3d at 141-42 & n.10 (observing that the lack of evidence in the record "reinforces the conclusion" that there is no logical connection between Pennsylvania's regulation and its asserted purpose). Its analysis of the evidence was not, as Petitioner suggests, a requirement that the state produce empirical proof of the efficacy of its methods. Pet. Brief 23.

2. The Logical Connection Between the Regulation and the Government's Stated Goal of Behavior Modification Is, At Best, Extremely Attenuated

Pennsylvania prison officials assert three penological goals advanced by the LTSU Level 2 publication ban, of which behavior modification is the "primary, most important purpose."[3] Jt App 27. According to the prison rationale, depriving Level 2 inmates of their First Amendment rights

---

[3] The other two justifications were that "the less material Level 2 prisoners have in their cells, the easier it is for correctional officers to detect concealed contraband and provide security" and "newspapers and magazines can be rolled up and used as blow guns or spears, can fuel cell fires, or can be used as crude tools to catapult feces at the guards." *Banks*, 399 F.3d at 138.

would "create an incentive to comply with prison rules and thereby be removed to Level 1 and eventually to the general population." *Banks*, 399 F.3d at 138. The prospect of losing access to newspapers and magazines would also affect the Level 1 and other inmates by discouraging them from misbehavior. *Id.* According to Petitioner's theory, the loss of newspaper and magazine rights would either scare or oppress inmates into compliance and result in greater order and institutional security. *See* Pet. Brief 24-25. In essence, the penological objective of the challenged regulations is to impose upon Level 2 inmates a quantum of harshness beyond the severity of less restrictive segregation levels.

Certainly, the establishment of a system of incentives is a legitimate "tool of prison administration." *McKune v. Lile*, 536 U.S. 24, 39 (2002) (plurality opinion). This Court has explained this principle in the First Amendment context: "Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Overton*, 539 U.S. at 134. In *Overton*, the Michigan Department of Corrections promulgated regulations limiting the number and manner of visits a prisoner could receive, completely proscribing visits from most minors, in response to increased substance abuse problems in the prison. Observing that "freedom of association is among the rights least compatible with incarceration," and acknowledging that "[d]rug smuggling and drug use in prison are intractable problems," the Court applied the *Turner* factors and upheld the restriction as a reasonable exercise of administrative judgment. *Id.* at 131-36. *Overton* made clear that the prison administrative prerogative is at its apex when regulations govern the physical association of inmates. The strong relationship between the prison's interest in preventing drug smuggling made it easy for all nine Justices to vote in favor of upholding the regulation.

The challenged Pennsylvania regulation, however, does not concern inmate association and lacks any real connection to the stated prison objectives. Although the policy purports to serve a rehabilitative purpose, it prevents prisoners from receiving publications from rehabilitative organizations such as Alcoholics Anonymous, Stop Prisoner Rape, and so on, and exacerbates pervasive illiteracy in prisons. The blunt design of the regulation belies Petitioner's claimed rehabilitative purpose. The behavior modification rationale advanced by the state officials in this case reaches dramatically farther than any regulations upheld by this Court to date. Unlike the limit on in-person visitation in *Overton* or the tightly circumscribed category of prohibited publications in *Thornburgh*, the liberties that the LTSU policies curtail lack any nexus to disciplinary problems in Pennsylvania prisons. Instead, the restricted First Amendment rights appear to be chosen for limitation largely because their exercise would be highly valued. Moreover, because prison officials have framed their purpose in such a way that the greater the constitutional deprivation, the more likely it is to bring about the desired effect, common sense requires a healthy dose of skepticism. *See* Brief for the Becket Fund for Religious Liberty as Amicus Curiae 9-11. When privileges that do not implicate constitutionally protected rights are available for "extension and withdrawal," the prison administrators' choice to limit inmates' First Amendment rights makes the logical connection between the restriction and any legitimate penological goal seem dubious at best, and likely to be an "exaggerated response" to perceived prison needs.

B. Availability of Alternative Means to Exercise the Constitutionally Protected Right

The second factor concerns the existence of "alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90; *cf. ISKCON*, 505 U.S. at 692 (O'Connor, J., concurring in the judgment)

(regulations that "leave open ample alternative channels of communication" are more likely to be constitutional). Consideration of this factor should be paramount here, where the logical connection between the regulation and the legitimate penological goal is tenuous. Indeed, the Court has anticipated and cautioned against the conditions imposed by the Pennsylvania Department of Corrections. *See Thornburgh*, 490 U.S. at 417 n.15 (remarking that a "broadly restrictive rule against admission of incoming publications" might well "run afoul of the second *Turner* factor").

The correct unit of analysis for the second *Turner* factor is the group whom the regulation affects—Level 2 inmates. *Cf. ISKCON*, 505 U.S. at 692. Because of the indefinite duration of LTSU Level 2 tenure and lack of objective criteria for advancement to Level 1, there is no assurance that a Level 2 inmate will ever advance to a less restricted classification. Contrary to Petitioner's arguments, it is therefore inappropriate to inquire whether adequate alternatives exist for all prisoners generally. Focusing on Level 2 inmates, prison policies completely restrict the ability to receive communication from non-religious and non-legal publishers and writers. Aside from the limited amount of personal and legal correspondence that is still permitted, LTSU Level 2 inmates face a total deprivation of communication with the secular outside world. As Judge (now Justice) Alito acknowledged in his dissent from the Third Circuit opinion, "[t]his is the most troubling of the four factors." *Banks*, 399 F.3d at 149.

Petitioner's pinched application of the second *Turner* factor would approve virtually any limitation on expression, as long as some means remained for prisoners to "receive information and communications from the outside world." Pet. Brief 29-30. Such an approach misinterprets and vastly expands this Court's decisions. In *Overton*, for example, visitation rights were only proscribed for one group of prospective visitors, minors who were not the children,

grandchildren, or siblings of the prisoner. The prisoner and prohibited minors could still communicate with one another through letters and telephone calls. *Overton*, 539 U.S. at 135; *see also Pell*, 417 U.S. at 824-25 (media representatives who could not conduct in-person interviews could still communicate directly with prisoners by letter or telephone); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (union was prohibited from mass distribution within prison but could still send materials through individual mail); *see also ISKCON*, 505 U.S. 672 (solicitors could disseminate their messages through distributing leaflets). The Pennsylvania restriction is categorically different from the ones upheld in *Overton*, *Pell*, and *Jones*. The policy here completely closes the avenue of communication between the prisoner and the "publishers who wish to communicate with those who, through subscription, willingly seek their point of view [and who] have a legitimate First Amendment interest in access to prisoners." *Thornburgh*, 490 U.S. at 408. It is much more akin to the "absolute ban" on leaflet distribution struck down in *ISKCON*. 505 U.S. at 831. The second factor weighs heavily in favor of invalidating the restrictions.

C. Effect of Accommodation

The third relevant factor for consideration is the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. After considering the proffered alternatives, the Third Circuit properly determined that accommodation of the First Amendment right in this case would not have a deleterious "ripple effect" on the rest of the prison population and staff. *Banks*, 399 F.3d at 146-48.

Evidence in the record supported the Third Circuit's determination that any impact on prison resources of accommodating these prisoner's First Amendment entitlements would be low, taking into account *Turner*'s

admonishment that "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Turner*, 482 U.S. at 90. The number of inmates to whom the accommodation would apply was only approximately forty, or 0.1% of the prison population. Jt App 127. Prison regulations already permitted Level 2 inmates to go to the mini-law library, Jt App 157, which would minimize the additional burden of the accommodation suggested by the Third Circuit. *Banks*, 399 F.3d at 147 (suggesting as a possible accommodation that "individual prisoners could be escorted to the secure mini-law library to read a periodical of their choosing"). The Third Circuit correctly determined that accommodations proposed by Banks were reasonable and not excessively burdensome to prison administrators.

D. Availability of Reasonable Alternatives

Finally, "the existence of obvious, easy alternatives [to accomplish prison goals] may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90. The primary asserted prison concern in this case is to create conditions of confinement unpleasant enough to deter non-LTSU Level 2 inmates from misbehaving and encourage Level 2 inmates to behave in the hopes of being promoted to a different level of housing. Pet. Brief 5. Aside from the high value inmates are likely to place on the exercise of their First Amendment right to newspapers and magazines, *cf. Kimberlin*, 318 F.3d at 240 (Tatel, J., concurring and dissenting) ("regulations that deprive prisoners of their constitutional rights will *always* be rationally related to the goal of making prison more miserable"), Petitioner demonstrated no specific interest in depriving inmates of publications.

The alternatives considered by the Third Circuit appropriately focused on the state's broad asserted goal of creating a more severe state of confinement than LTSU

Level 1. The record shows that Level 1 inmates are allowed to spend five dollars per week on commissary compared to no commissary privileges for Level 2 inmates; Level 1 inmates are permitted two immediate family visits per month rather than one, and one phone call a month rather than emergency calls only; Level 2 inmates are also allowed GED or Special Ed in-cell study program, are compensated for work, and can get additional privileges authorized at the discretion of prison officials. Jt App 32-33, 48, 102. Where, as here, the penological objective can be fulfilled through measures that do not burden constitutional rights, the infringing regulation is likely to be an exaggerated response. The Third Circuit correctly concluded that these differences between Levels 1 and 2 suffice to satisfy prison goals.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

LUCY A. DALGLISH
GREGG P. LESLIE
SUSAN K. BURGESS
Reporters Committee for
Freedom of the Press

MICHAEL A. BAMBERGER
RACHEL G. BALABAN
Sonnenschein Nath &
Rosenthal LLP

SANFORD JAY ROSEN
Counsel of Record
JANET TUNG
Rosen, Bien & Asaro, LLP

February 16, 2006

Counsel for Amici Curiae

APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF THE AMICI CURIAE

Prison Legal News ("PLN") is a non-profit, charitable corporation that publishes a nationally distributed monthly journal of the same name. Since 1990, *Prison Legal News* has reported on news, court decisions, and other developments relating to the civil and human rights of prisoners, crime victims, and correctional staff in the United States and abroad. *PLN* has the most comprehensive coverage of detention facility litigation of any publication. In addition to reporting on the rights of prisoners, *PLN* also reports on the rights of crime victims, prison and jail employees, and prison and jail visitors. Nearly every issue of *PLN* covers court decisions and information on the rights of prisoners in segregated control units. *PLN* has approximately 4,600 subscribers in all fifty states and abroad. Approximately sixty-five percent of *PLN* subscribers are state and federal prisoners, including prisoners in the custody of the Pennsylvania Department of Corrections, including its control units, and prisoners in control units nationwide.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of

libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Publishers Marketing Association ("PMA") is a nonprofit trade association representing more than 4,200 publisher members across the United States and Canada. PMA members include independent, non-profit and university press who publish a variety of literary works, including fiction and non-fiction books on all topics. The works of its members contribute to the public debate on cultural, social and political issues. The right to open access to the media, including sources for discussion of current national and worldwide news and events, is of paramount concern to PMA's members. PMA believes that this case will potentially burden the First Amendment rights of its

members and bears directly on the ability of its members to disseminate and receive ideas and information.